Supreme Court, U.S.
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No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, *et al.*

Petitioners,

v.

RICHARDSON-MERRELL INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does an opinion of the District of Columbia Court of Appeals, upholding a product liability verdict, mandate that under *Erie* a Federal court sitting in the District of Columbia cannot apply the Federal Rules of Evidence to set aside a plaintiffs' verdict in a different case tried three years later involving the same product and in which substantial additional scientific evidence was presented?

2. May Federal courts determine that proffered expert testimony lacks an adequate scientific basis and is therefore inadmissible under Federal Rules of Evidence 403, 702 and 703?

3. Do Federal courts that find proferred evidence insufficient to sustain a verdict violate the Seventh Amendment right to a jury trial?

CORPORATE AFFILIATIONS OF RESPONDENT

Respondent Richardson-Merrell Inc. (now Merrell Dow Pharmaceuticals Inc.) is a subsidiary of The Dow Chemical Company. Its subsidiaries and affiliates that have securities in the hands of the public are the following:

Alamo Land Company, Inc.; Arabian Chemical Company Limited; Compagnie des Services Dowell Schlumberger; Chief Shipping Company; DCU/LB TRUST; Cromarty Petroleum Company Limited; Chimtrade; Transformadora de Etileno S.A.; Vorakim Kima Sanayi Ve Ticaret A.S.; Dowell Schlumberger Canada, Inc.; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech, Inc.; Wabiskaw Explorations Ltd.; Haeger and Kaessner Limited; Viopal S.A.; Scotdril Offshore Company; Dow Corning Corporation; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Joliet Marine Terminal Trust Estate; M.D. Kasei Limited; Funai Pharmaceuticals Company Ltd.; First Chemical Factoring S.p.A.; Laboratories Industriales Farmaceuticos Ecuatorianos (L.I.F.E.); MDP (Holdings) Ltd.; Fort Saskatchewan Ethylene Storage Corporation; Oronzio de Nora Technologies BV; Pacific Chemicals Berhad; Petroquimica-Dow S.A.; P.T. Pacific Chemicals Indonesia; Vorakim Kimya Sanayi VE Ticaret A.S.; Oronzio de Nora Technologies S.p.A.; Zip Pak Incorporated; Ulsan Pacific Chemical Company Ltd.; Dow Kakoh Kabushiki Kaisha; Family Com.

e Ind. de Productos de Limpeza Ltda.; Oronzio de Nora S.A., (Lugano); Pacific Chemicals (Pakistan) Ltd.; Pacific Plastics (Thailand) Limited; Eurosemences, S.A.; Garit-Essex, A.G.; Pacific Cable Products Sendirian Berhad; The Cynara Company

In addition, it should be noted that a proposed merger of Merrell Dow Pharmaceuticals Inc. and Marion Laboratories, Inc. was announced to the public on July 17, 1989, whereby, if it becomes effective, The Dow Chemical Company would own two-thirds (2/3) of the merged corporation.

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I. STATEMENT OF THE CASE

A. The Opinions Below

Petitioners asserted at trial that Bendectin, a widely prescribed morning sickness medication, was responsible for the infant plaintiff's birth defects.[1] The District Court granted Respondent Merrell Dow Pharmaceutical Inc.'s[2] motion for judgment n.o.v. following a jury verdict in Petitioners' favor. The District Court found that plaintiffs had failed to sustain their burden of proof on the issue of causation, stating:

> [T]here is now nearly universal scientific consensus that Bendectin has not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus without indulging in precisely the same speculation and conjecture which the multiple investigations undertook, but failed, to confirm.

Richardson v. Richardson-Merrell Inc., 649 F. Supp. 799, 803 (D.D.C. 1986).

The Court of Appeals (Circuit Judges Robinson, Silberman and D.H. Ginsburg) unanimously affirmed the

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[1] Bendectin was approved by the Food and Drug Administration ("FDA") in 1956 as safe for the treatment of nausea and vomiting in pregnancy and has been used in over 30 million pregnancies. Merrell Dow voluntarily discontinued marketing Bendectin in 1983 as the result of costs associated with litigation. The medication remains approved by the FDA. No scientist in any peer-reviewed medical or scientific journal, or in any text or reference work has ever concluded that Bendectin causes birth defects.

[2] Merrell Dow Pharmaceuticals Inc. was sued herein under its former name Richardson-Merrell Inc.

District Court's decision based, *inter alia*, upon the application of Rules 403, 702 and 703 of the Federal Rules of Evidence to plaintiffs' expert testimony. *Richardson v. Richardson-Merrell Inc.*, 857 F.2d 823 (1988), *petition for reh'g and suggestion for reh'g en banc denied*, No. 87-7023 (Apr. 6, 1989) ("*Richardson*"). The Court held that while Rule 703 broadens the acceptable basis for an expert's opinion, it does not preclude a Federal court from determining that an expert's opinion lacks a proper foundation. The Court further held that Rule 703 does not prevent a Federal court from reviewing the evidence presented to the jury and concluding that this evidence does not support a jury verdict:

> Whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been met, are matters of law for the court to decide.

857 F.2d at 829 (A-13).

Within this evidentiary framework, the Court of Appeals conducted a detailed factual examination of the evidence concerning Bendectin. Dr. Alan K. Done, plaintiffs' principal expert,[3] predicated his opinion that Bendectin causes birth defects upon an analysis of four factors: (1) chemical/structure activity, (2) *in vi-*

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[3] The Court of Appeals focused on Dr. Done's testimony because he was plaintiffs' principal expert witness. As the Court noted, Dr. Done's testimony subsumed the testimony of plaintiffs' other experts. 857 F.2d at 829 n.38 (A-13). Dr. Done was the *only* medical doctor who had reviewed the scientific evidence and had concluded that Bendectin caused the plaintiff's injuries. Petitioners' statement that eight expert witnesses testified that Bendectin caused the infant plaintiff's birth defects (Pet., p.3) is wrong.

tro (test tube) studies, (3) *in vivo* (animal) teratology studies, and (4) epidemiological studies. 857 F.2d at 829 (A-14). The Court examined the evidence supporting each of these factors and held that this evidence, in whole or in part, provided no support for the expert's conclusion that Bendectin caused the child's birth defects. 857 F.2d at 829-30 (A-14). Indeed, with respect to the fourth factor, human epidemiological studies, the Court observed that Dr. Done had admitted that the studies did not show the necessary statistical association between Bendectin and limb defects. 857 F.2d at 831 (A-17). Because Dr. Done's opinion lacked an adequate scientific basis, the Court of Appeals concluded that, under the Federal Rules of Evidence, his opinion could not support the jury's verdict:

> Dr. Done's opinion lacks an adequate basis and therefore, whether viewed alone or in conjunction with those of the other experts, did not provide the "substantial probative evidence" that would require us to leave the verdict as the jury rendered it.

857 F.2d at 829 (A-13).

B. The *Oxendine* Case

The case of *Oxendine v. Merrell Dow Pharmaceuticals Inc.*, 506 A.2d 1100 (D.C. 1986) ("*Oxendine*"), also involved a claim that Bendectin caused birth defects. *Oxendine* was tried in the Superior Court for the District of Columbia in 1983, three years before the *Richardson* trial. During the intervening three-year period substantial additional scientific evidence was accumulated on Bendectin and presented to the *Richardson* jury. (See pages 6-8, *infra*.) This evidence confirmed that Bendectin did not cause birth defects.

Unlike the trial court in *Richardson*, the trial court in *Oxendine* did not admit into evidence many of the epidemiological studies that confirmed the lack of a relationship between Bendectin and birth defects. Unlike the United States Court of Appeals in *Richardson*, the D.C. Court of Appeals in *Oxendine* did not conduct any analysis under evidentiary rules similar to Federal Rules of Evidence 403, 702 or 703 to determine the admissibility of plaintiffs' expert testimony.

The *Oxendine* decision was based in substantial part upon an incorrect application of the United States Court of Appeals for the District of Columbia's decision in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). The *Oxendine* Court construed *Ferebee* as holding that a jury issue necessarily exists whenever conflicting expert testimony, and a corresponding "battle of the experts", is presented. 506 A.2d at 1104, 1110. In *Richardson* the United States Court of Appeals rejected this construction of its *Ferebee* decision stating that *Ferebee* applies only when the causation issue is novel and "*stand*[*s*] *at the frontier of current medical and epidemiological inquiry*," 857 F.2d at 832 (A-20) (emphasis in original). The *Richardson* Court held that a jury question is not necessarily presented when the issue has been extensively studied and is settled within the scientific community. The *Richardson* Court observed that the facts in *Ferebee* were readily distinguishable from those in *Richardson*:

> And far from a paucity of scientific information on the oft-asserted claim of causal relationship of Bendectin and birth defects, the drug has been extensively studied and a

> wealth of published epidemiological data has been amassed, none of which has concluded that the drug is teratogenic. Uniquely to this case, the law now has the benefit of twenty years of scientific study, and the published results must be given their just due.

857 F.2d at 832 (A-20).

Petitioners also fail to inform the Court that the *Oxendine* decision is not final. A new trial has been ordered based upon a subsequent trial court finding that Dr. Done committed perjury during the *Oxendine* trial. *Oxendine v. Merrell Dow Pharmaceuticals Inc.*, Civ. No. 1245-82 (Super. Ct. D.C. Feb. 12, 1988) (Memorandum Order). An appeal to the D.C. Court of Appeals from this decision is presently pending.

II. REASONS FOR DENYING THE WRIT

A. This Case Raises no *Erie Question*

To create their *Erie* question, Petitioners point to the D.C. Court of Appeals decision in *Oxendine* which they say is binding on this case. Petitioners' position was rejected by the United States Court of Appeals in *Richardson* for three independent reasons: (1) *Erie* does not apply where different evidence is presented, (2) *Erie* does not affect a Federal court's application of the Federal Rules of Evidence, and (3) *Erie* does not apply to procedural issues. 857 F.2d at 825 n.9 (A-4 to 5).[4]

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[4] This case is a particularly inappropriate one in which to render a judicial interpretation concerning the application of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to the Federal Rules of Evidence because the Rules of Decision Act, 28 U.S.C. § 1652 (1982), does not apply to the District of Columbia. In

1. The Court of Appeals was not Bound by *Oxendine* Because Different Evidence was Presented

The *Oxendine* case was tried in 1983; the *Richardson* case was tried in 1986. During the intervening three years, two large and powerful epidemiological studies were published confirming that Bendectin is not associated with limb defects. These studies were admitted into evidence during the *Richardson* trial. McCredie, J. *et al.*, "The Innocent Bystander: Doxylamine/Dicyclomine/Pyridoxine and Congenital Limb Defects," *Med. J. Australia* 140:525-527 (Apr. 28, 1984) ("McCredie Study") (Tr. 3808-3809; DA. I, Tab 20);[5] Aselton, P. *et al.*, "First-Trimester Drug Use and Congenital Disorders," *Obstet. & Gynec.* 65(4):451-455 (Apr. 1985) ("Aselton Study") (Tr. 3802-3803; DA. I, Tab 10). The McCredie Study states:

> Published reviews of the scientific literature, medico-legal testimony, and a U.S. Food and Drug Administration (FDA) hearing confirmed the epidemiological opinion that there is no evidence of an increase in the frequency of malformations in Bendectin exposed infants.

Palmore v. United States, 411 U.S. 389, 395 (1973), this Court held that the word "state" does not include the District of Columbia unless the statute specifically so provides. The Rules of Decision Act has never been amended to include the District of Columbia. The United States Court of Appeals for the District of Columbia has applied the *Erie* doctrine to diversity cases coming before it solely as a matter of judicial comity. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979).

[5] References to "Tr." are to the transcript in the trial court. Citations in the form "D.A. I, Tab" are to documents contained in Respondent's Appendix to its brief in the Court of Appeals.

* * * * *

> Our study provides no evidence that [Bendectin] is implicated in the aetiology of congenital limb defects. It appears to be an innocent bystander in this controversy.

McCredie Study at 525, 527. Neither the McCredie Study nor the Aselton Study were available during the *Oxendine* trial. Numerous other peer-reviewed articles were published after the *Oxendine* trial. None concluded that Bendectin caused birth defects.

In addition to the more recent studies, the record in *Richardson* was significantly more extensive than the record in *Oxendine*. The trial court in *Richardson* admitted into evidence 21 published, peer reviewed epidemiological studies which permitted a complete review of the relevant published material. (D.A. I, Tabs 10-30). In *Oxendine*, the trial court admitted only 3 of these studies, ruling that they would be received into evidence only if the authors were available to testify. Thus, in *Oxendine* most of the then-existing epidemiological studies never became part of the record.

In *Richardson* both the District Court and the Court of Appeals recognized the factual differences between this case and *Oxendine*.[6] The District Court in *Richardson* noted that the D.C. Court of Appeals in *Oxendine* did not "address the significance of certain evidence bearing upon the *current* state of scientific knowledge." 649 F. Supp. at 799 (emphasis added). The Court of Appeals in *Richardson* likewise stated: "[w]e note that the Richardsons' argument ignores

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[6] Petitioners' assertion that the evidence was identical is simply wrong.

the differences in the evidence presented in the two cases." 857 F.2d at 825 n.9 (A-5).

The factual distinctions between the two cases fully justified the *Richardson* Court's determination that no *Erie* issue was presented.

2. The Court of Appeals was not Bound by *Oxendine* Because Federal Courts Must Apply the Federal Rules of Evidence

The Court of Appeals correctly determined that the application of the Federal Rules of Evidence is a procedural matter that presents no *Erie* question:

> In addition, it is clear that *Erie* does not affect the federal courts' application of the Federal Rules of Evidence. *Eli Lilly & Co. v. Home Ins. Co.*, 254 U.S. App. D.C. 1, 6, 794 F.2d 710, 715 (1986); see also C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4512 (1982).

857 F.2d at 825 n.9 (A-5).

Petitioners completely ignore this holding in their Petition—and with good reason. The Federal Rules of Evidence unquestionably govern the admissibility of testimony in Federal courts. Federal courts must remain free to construe the Federal Rules of Evidence, and *Erie* does not alter this fundamental precept. *Hanna v. Plumer*, 380 U.S. 460 (1965).[7] The Court

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[7] The Federal Rules of Evidence stand on even firmer footing than do the Federal Rules of Civil Procedure considered in *Hanna* because they are statutory. Pub. L. No. 93-595, 88 Stat. 1926 (1975). 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4512 (1982); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 280 (5th Cir.), *cert. denied*, 108 S. Ct. 152

of Appeals correctly noted that the application of the Federal Rules of Evidence involved procedural issues, as to which *Erie* does not apply. 857 F.2d at 825 n.9 (A-5).[8]

The possibility that the application of the Federal Rules of Evidence may cause different results in state and Federal courts does not offend the *Erie* doctrine. The fact that the *Richardson* Court, applying the Federal Rules of Evidence, may have reached an outcome different from that of the D.C. Court of Appeals in *Oxendine* is of no consequence. In *Hanna*, this Court explicitly rejected the rigid outcome-determination analysis urged by the Petitioners. 380 U.S. at 466-69.

3. The Court of Appeals was not Bound by *Oxendine* Because Federal Courts are Entitled to Make Their Own Determinations as to Whether a Jury Issue is Presented

The procedural question concerning the sufficiency of evidence necessary to submit a case to the jury is a matter of Federal, not state, law and, therefore, *Erie* does not apply. 857 F.2d at 825 n.9 (A-4 to 6). A Federal court need not submit an issue to the jury in a diversity case merely because a state court would

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(1987) (in diversity cases the Federal Rules of Evidence govern the admissibility of expert testimony). There is no contention made by Petitioners here or in the Court of Appeals that Congress exceeded its power to regulate Federal courts in enacting these rules.

[8] Moreover, no conflict involving evidentiary rules exists between *Richardson* and *Oxendine* because the *Oxendine* court did not even consider the admissibility of expert testimony under District of Columbia evidentiary rules.

be obliged to do so if the case were being tried in that court. "[W]hether a given question of fact is to be resolved by the judge or by the jury . . . is a procedural problem that is controlled by federal law." 5A *Moore's Federal Practice* ¶ 50.06 at 50-55 (2d ed. 1989).

The leading cases on this issue are *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931), and *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). In *Herron*, the defendant moved for a directed verdict on the ground of contributory negligence. The court directed a verdict for the defendant despite an express provision of the Arizona constitution that "[t]he defense of contributory negligence . . . shall, at all times, be left to the jury." 283 U.S. at 92. This Court affirmed the trial court's refusal to follow the state's constitutional rule and explained that "[t]he controlling principle . . . is that, state laws cannot alter the essential character or function of a Federal court. The function of the trial judge in a Federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the Federal court under either the Conformity Act or the 'Rules of Decision' Act." 283 U.S. at 94.

State procedural and evidentiary rules do not apply in Federal courts and do not diminish the authority of Federal judges to grant directed verdicts or judgments n.o.v. Even if *Oxendine* could be read as holding that a District of Columbia court would be required to submit the causation issue to a jury under the facts presented in *Richardson*, that ruling would not bind a Federal court, just as the Arizona consti-

tutional provision did not bind the trial court in *Herron*.[9]

This Court has confirmed that the authority of *Herron* continues unaffected by *Erie*. In *Byrd*, this Court cited *Herron* with approval and expressly indicated that the intervening *Erie* decision did not affect its validity, noting, *inter alia*, that there is "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." 356 U.S. at 538-39.

This matter is not, as Petitioners contend, controlled by *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940) (Pet., p. 9). That decision involved an application of the law of the case doctrine because the parties and the facts were identical and no Federal judge - jury relationship was involved. *Stoner* does not apply when the evidence submitted in two separate trials is different, when a Federal court is applying the Federal Rules of Evidence to the facts before it, or when a question of the judge-jury relationship in the Federal courts is presented.

B. There is no Conflict in the Circuits Concerning the Application of Rule 703 of the Federal Rules of Evidence

The Court of Appeals' decision in *Richardson* does not conflict with the decisions of any other Circuits concerning the application of the Federal Rules of

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[9] To the extent that any conflict exists between *Richardson* and *Oxendine* involving the sufficiency of evidence necessary to submit a case to a jury, it must be noted that the *Oxendine* decision rested in large part upon an incorrect construction by a local court of appeals of the United States Court of Appeals for the District of Columbia's decision in *Ferebee*. The *Richardson* court was certainly not required to accept another court's incorrect construction of its *Ferebee* decision.

Evidence. No other Court of Appeals has ever held, as Petitioners suggest, that a Federal trial court is not empowered under Rule 703 to review whether an expert's opinion has a sufficient basis.

Petitioners contend that the D.C. Circuit decision in *Richardson* is in conflict with decisions of the Fifth, Third and Sixth Circuits. This asserted conflict stems from a serious misreading of the decisions in these Circuits. To the contrary, each Court of Appeals in these Circuits has consistently held that a Federal trial court has the right and obligation to carefully review an expert's testimony to ensure that there exists a sufficient basis for any expert opinion.

The Fifth Circuit has never ruled that a Federal court is powerless to evaluate the basis for an expert's opinion, and none of the cases cited by Petitioners supports that proposition. In *Peteet v. Dow Chemical Co.*, 868 F.2d 1428 (5th Cir. 1989) (Pet., p. 10), the Fifth Circuit stated just the opposite:

> Despite this broad discretion, we are mindful that district judges and appellate courts must carefully review an expert's testimony to ensure that the expert has the necessary qualifications *and a sufficient basis for his opinion.*

868 F.2d at 1431. [citation omitted] (emphasis added.) In *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1476 (1988) (Pet., p.11), the Fifth Circuit reaffirmed its power to withdraw the case from the jury if the expert's opinion lacks a sufficient factual foundation. 825 F.2d at 916 n.13. ("If Dr. Benowitz's [plaintiff's expert] opin-

ion of causation were based solely on this theory, therefore, [defendant] might be correct that Dr. Benowitz's opinion could not provide the requisite support for the jury's verdict."). In both *Peteet* and *Osburn*, the Fifth Circuit reviewed the expert's opinion as well as the basis for the expert's opinion. The only difference between these cases and *Richardson* is that in these cases the Fifth Circuit ultimately concluded that a factual basis for the expert's testimony existed.[10]

Petitioners' contention that a conflict exists with the Fifth Circuit is even more frivolous in view of that Court's recent decision in *Brock v. Merrell Dow Pharmaceuticals Inc.*, 874 F.2d 307 (5th Cir.), *suggestion for reh'g en banc pending*, No. 88-2311 (filed June 20, 1989). This was another Bendectin case where the Court of Appeals evaluated plaintiffs' expert testimony. In *Brock*, the Fifth Circuit explicitly adopted the *Richardson* analysis, and concluded that the jury's verdict in favor of plaintiffs should be reversed. 874 F.2d at 311.

The Third Circuit likewise has not ruled that a Federal court is powerless to evaluate the basis of an expert's testimony. *E.g., Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 745 F.2d 248, 262 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

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[10] Other Fifth Circuit cases have granted verdicts for the defense after conducting a Rule 703 analysis. In *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987), the Fifth Circuit specifically followed the decision of the D.C. Circuit in *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977), when it granted summary judgment for the defendant despite expert testimony that the defendant's product was the cause of plaintiff's illness. *See also Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983).

The decision in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (Pet., p.11), is not to the contrary. In that case, the Third Circuit agreed that, if an expert's opinion is challenged under Rule 703, the Court must make an initial factual determination whether the requirements of Rule 703 have been satisfied. 723 F.2d at 276, 277. The only difference between *Japanese Electronic Products* and *Richardson* is that the Third Circuit ultimately concluded that there was a factual basis for the expert's opinion.

Nor has the Sixth Circuit ruled that a Federal court may not evaluate the basis for an expert's testimony. *E.g., Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 772 n.4 (6th Cir. 1989). Petitioners' reference to *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 788 (1989) (Pet., p. 12), for a claimed conflict with the Sixth Circuit is as misleading as it is inaccurate. In that case, the Sixth Circuit affirmed a jury verdict in favor of Merrell Dow in a consolidated trial involving over 1,000 plaintiffs. It had no occasion to construe or apply Rule 703 because it was not an issue on appeal. Petitioners' quotations are totally out of context. The Sixth Circuit did *not* reach, or even discuss, the question of whether the evidence presented created a jury issue.

In essence, Petitioners are asking this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have not found—a factual basis for plaintiffs' expert testimony. This Court has ruled that such a factual canvassing

is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). In the present case, Petitioners raise questions turning uniquely on the facts of this case. Certiorari, therefore, should be denied.

C. The Asserted Seventh Amendment Question is Frivolous

Petitioners' Seventh Amendment claim has even less merit. Essentially, Petitioners would have this Court consider whether the Federal Rules of Evidence and Federal Rules of Civil Procedure should be ignored whenever a party offers evidence it wishes a jury to assess. Whether proferred evidence is admissible or is sufficient even to raise a jury question is itself an issue of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Here that legal issue was correctly determined by the lower courts in accordance with the governing Federal Rules. This does not raise a Seventh Amendment question meriting this Court's review.

III. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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